

US TAX COURT
RECEIVED

OCT 3 2016
3:24 PM

SYM



US TAX COURT
eFILED

OCT 3 2016

JEREMY M. JACOBS & MARGARET J. JACOBS
Petitioner(s)

ELECTRONICALLY FILED

v.

Docket No. 19009-15

COMMISSIONER OF INTERNAL REVENUE,
Respondent

SIMULTANEOUS OPENING BRIEF

SERVED Oct 04 2016

UNITED STATES TAX COURT

JEREMY M. JACOBS &)	
MARGARET J. JACOBS,)	
)	
Petitioners,)	
)	
v.)	Docket No. 19009-15
)	
COMMISSIONER OF INTERNAL REVENUE,)	Judge Ruwe
)	
Respondent.)	Filed Electronically

BRIEF FOR RESPONDENT

WILLIAM J. WILKINS
Chief Counsel
Internal Revenue Service

OF COUNSEL:
THOMAS J. KANE
Division Counsel
(Large Business & International)
MICHAEL P. CORRADO
Area Counsel
(Heavy Manufacturing & Pharmaceuticals)
PATRICIA Y. TAYLOR
Associate Area Counsel
(Newark)

CONTENTS

PRELIMINARY STATEMENT	6
QUESTIONS PRESENTED	8
RESPONDENT'S REQUEST FOR FINDINGS OF FACT	10
ULTIMATE FINDINGS OF FACT	44
POINTS RELIED UPON	46
ARGUMENTS	49
I. Commissioner Properly Disallowed Deeridge's Meal Costs in Excess of 50% Claimed Under I.R.C. §§ 274(a) & (n) .	49
II. Petitioners Failed to Substantiate Exception to 50% Meals Limitation Under I.R.C. §§ 274(n)(2)(B) and 132(e)(2) .	50
A(1). BPHA Does Not Own or Lease Eating Facilities . . .	51
A(2). No Contract for the Operation of Eating Facility .	53
A(3). Away City Hotels Were Not BPHA's Business Premises	55
B. Revenue from Eating Facility Does Not Equal Direct Operating Costs	59
B(1). Meals Furnished to Players Were Not Done for BPHA's Convenience	60
B(2). Meals Not Provided on BPHA's Business Premises . .	63
B(3). Insufficient Number of Employees Precludes Full Application of I.R.C. § 199 Exclusion	64
C. Provision of Meals Discriminates in Favor of Highly- Compensated Employees	64
III. Petitioners Failed to Substantiate Exception to 50% Meals Limitation Under I.R.C. §§ 274(n)(2)(B) and 132(e)(1) .	69
IV. Petitioners Failed to Substantiate Exception to 50% Meals Limitation Under I.R.C. §§ 274(n)(2)(A) and 274(e)(8) .	71
CONCLUSION	75

CITATIONS

Cases

<u>Adams v. United States</u> , 585 F.2d 1060 (Ct. Cl. 1978)	55
<u>Boyd Gaming Corp. v. Commissioner</u> , 106 T.C. 343 (1996)	74
<u>Boyd Gaming Corp. v. Commissioner</u> , 177 F.3d 1096 (9 th Cir. 1999)	61, 62, 74
<u>Boston Professional Hockey Association, Inc., v. Commissioner of Revenue</u> , 820 N.E.2d 792 (Mass. 2005), 443 Mass. 276 (Oct. '04 - Jan. '05)	73
<u>Benninghoff v. Commissioner</u> , 71 T.C. 216 (1978) (per curiam) .	56
<u>Churchill Downs, Inc. v. Commissioner</u> , 115 T.C. 279, 280 (2000) <u>aff'd</u> , 307 F.3d 423, 429 (6 th Cir. 2002)	74
<u>Commissioner v. Nat'l Alfalfa Dehydrating & Milling Co.</u> , 417 U.S. 134, (1974)	49
<u>Commissioner v. Kowalski</u> , 434 U.S. 77 (1977)	61
<u>INDOPCO, Inc. v. Commissioner</u> , 503 U.S. 79, 112 S.Ct. 1039, 117 L.Ed.2d 226 (1992)	49
<u>Jijun Chen v. Commissioner</u> , T.C. Memo. 2015-167	49
<u>Mabley v. Commissioner</u> , T.C. Memo. 1965-323	53
<u>McDonald v. Commissioner</u> , 66 T.C. 223 (1976)	56
<u>Moss v. Commissioner</u> , 80 T.C. 1073 (1983)	63
<u>New Colonial Ice Co. v. Helvering</u> , 292 U.S. 435, 54 S.Ct. 788, 78 L.Ed. 1348 (1934)	49
<u>Tidewater v. U.S.</u> , 565 F.3d 299 (5 th Cir. 2009)	52

Code Sections

I.R.C. § 119	60, 64
I.R.C. § 119(b)(4)	64

I.R.C. § 132(e)	50, 69
I.R.C. § 132(e)(1)	69
I.R.C. § 132(e)(2)	50, 54, 65, 69
I.R.C. § 132(e)(2)(A)	55
I.R.C. § 132(e)(2)(B)	59
I.R.C. § 132(j)(6)	65
I.R.C. § 162	49
I.R.C. § 262	63
I.R.C. § 274	49
I.R.C. § 274(a)	49
I.R.C. § 274(d)	49
I.R.C. § 274(e)(8)	71, 72, 74
I.R.C. § 274(n)	49
I.R.C. § 274(n)(1)	50
I.R.C. § 274(n)(1)(A)	50, 71
I.R.C. § 274(n)(2)(A)	71
I.R.C. § 274(n)(2)(B)	50, 69
I.R.C. § 414(q)(1)	65
I.R.C. § 7701(e)(1)	51

Treasury Regulations

Treas. Reg. § 1.119-1(a)(2)	60
Treas. Reg. § 1.119-1(a)(2)(ii)	60

Treas. Reg. § 1.132-6(d)(2)(A)	70
Treas. Reg. § 1.132-6(e)(1)	69
Treas. Reg. § 1.132-7	54
Treas. Reg. § 1.132-7(a)(1)(ii)	54
Treas. Reg. § 1.132-7(a)(2)	50-51
Treas. Reg. § 1.132-7(a)(2)(i)	51
Treas. Reg. § 1.132-7(a)(2)(iii)	55
Treas. Reg. § 1.132-7(a)(2)(iv)	51
Treas. Reg. § 1.132-7(a)(3)	53
Treas. Reg. § 1.132-7(b)(1)(ii)	54
Treas. Reg. § 1.132-7(b)(2)(ii)	54
Treas. Reg. § 1.132-8(c)(1)	66, 69
Treas. Reg. § 1.132-8(c)(2)(i)	66
Treas. Reg. § 1.132-8(c)(2)(ii)	66
Treas. Reg. § 1.132-8(d)(2)	68
Treas. Reg. § 1.132-8(f)(1)(ii)	65
Treas. Reg. § 1.132-8(f)(1)(iv)	65
Treas. Reg. § 1.274-2(f)(2)(ix)	71

Other Authorities

I.R.S. Notice 2008-102, 2008-2 C.B. 1106	65
I.R.S. Notice 2009-94, 2009-2 C.B. 848	65

UNITED STATES TAX COURT

JEREMY M. JACOBS &)	
MARGARET J. JACOBS,)	
)	
Petitioners,)	
)	
v.)	Docket No. 19009-15
)	
COMMISSIONER OF INTERNAL REVENUE,)	Judge Ruwe
)	
Respondent.)	Filed Electronically

BRIEF FOR RESPONDENT

PRELIMINARY STATEMENT

This is a proceeding to determine the income tax deficiencies for 2009 and 2010 of petitioners arising from the Commissioner's disallowance of 50% of meal expenses claimed by their S Corporation, Deeridge Farms Hockey Association ("Deeridge") which wholly-owned the Boston Professional Hockey Association, Inc. ("BPHA"), a QSub under I.R.C. § 1361(b)(3).

By Order dated February 2, 2016, the Court set this case for trial at a Special Trial Session scheduled to commence on July 18, 2016 in Washington, DC. Trial was held on that date, Honorable Robert P. Ruwe presiding.

The evidence consists of lay testimony presented at trial (citations to which are identified hereafter as "Tr._") and

stipulated facts and exhibits. The parties' First Stipulation of Facts ("Stip 1"), with paragraphs numbered 1 - 307 and attached exhibits marked as joint, numbered 1 - 590 ("Ex. __"), was filed with the Court and received into evidence. The parties' Amended Second Stipulation of Facts ("Stip 2 1"), with paragraphs 308 and 309 and attached exhibits marked as joint, numbered 591 - 650, was filed with the Court and received into evidence.

Simultaneous opening and reply briefs are to be filed on October 3, 2016, and November 17, 2016, respectively, and are both subject to a 75 page limit. (Tr. 193.23-194.3)

QUESTIONS PRESENTED

I. Whether the Commissioner erred in disallowing 50% of the meal expenses claimed by petitioners' business, Deeridge, for pre-game meals provided to employees of BPHA at away city destinations under I.R.C. §§ 274(a) & (n).

II. Whether the petitioners have substantiated exception to the 50% meal deduction limitation under I.R.C. §§ 274(n)(2)(B) and 132(e)(2).

A(1). Whether the petitioners have substantiated that BPHA owns or leases eating facilities at each of the away city hotels.

A(2). Whether the petitioners have substantiated that BPHA contracts for the operation of eating facilities at each of the away city hotels.

A(3). Whether the petitioners have substantiated that the alleged eating facilities are located on or near BPHA's business premises.

B. Whether the revenue derived from the operation of the eating facilities for BPHA equals or exceeds the direct operating costs of such facilities.

B(1). Whether the value of the pre-game meals may be excluded from BPHA's employees' gross income because the

provision of such meals was done for the convenience of BPHA as provided by I.R.C. § 119.

B(2). Whether the value of the pre-game meals may be excluded from the gross income of BPHA's employees because the provision of such meals was done on BPHA's business premises.

B(3). Whether the value of the pre-game meals may be excluded from the BPHA's employees' gross incomes because more than half of the employees to whom the meals are furnished are furnished such meals for the convenience of BPHA.

C. Whether the provision by BPHA of the pre-game meals to its professional hockey team impermissibly discriminates in favor of highly-compensated employees.

III. Whether the petitioners have substantiated exception to the 50% meal deduction limitation under I.R.C. §§ 274(n)(2)(B) and 132(e)(1).

IV. Whether the petitioners have substantiated exception to the 50% meal deduction limitation under I.R.C. §§ 274(n)(2)(A) and 274(e)(8) under entertainment sold to customers, for expenses for goods and services which are sold by BPHA in a bona fide transaction for an adequate and full consideration.

V. Whether the petitioners' Schedule A, Itemized Deductions, for their 2009 taxable year are \$1,321,312 as

limited by petitioners or \$1,317,763 as determined by the Commissioner. (As this is a computational adjustment dependent on the Court's determination of adjusted gross income, no further exposition of the issue follows.)

RESPONDENT'S REQUEST FOR FINDINGS OF FACT

Respondent respectfully requests the Court to find the following facts:

Background

1. Petitioners, Jeremy M. Jacobs and Margaret J. Jacobs, are individual taxpayers who resided in East Aurora, New York when they timely filed their Petition in this case. (Stip ¶1 and ¶7)
2. Petitioners dispute the Commissioner's determination of income tax deficiencies in his timely mailed statutory notice of deficiency with respect to their 2009 and 2010 taxable years in the amounts of \$45,205.00 and \$39,823.00, respectively. (Stip ¶2 and ¶3, Ex. 1-J)
3. The adjustments in the statutory notice derive from the Commissioner's disallowance of a portion of the meal expenses claimed for 2009 and 2010 by petitioners' business, Deeridge. (Stip ¶4)
4. During the years 2009 and 2010 (hereafter "years at issue"), either directly or through other entities, petitioner

Margaret J. Jacobs owned 1% of Deeridge, and petitioner Jeremy M. Jacobs owned 99% of Deeridge. (Stip ¶9) (References in the singular to "petitioner" hereafter are to petitioner Jeremy M. Jacobs.)

5. Deeridge wholly owned BPHA, a Massachusetts corporation, which was a QSub for Federal income tax purposes. (Stip ¶13 and ¶14, Ex. 7-J and 8-J)

6. Deeridge is a holding company for BPHA which owns and operates a franchise of the National Hockey League ("NHL") known as the Boston Bruins ("Bruins"). (Stip ¶15 and ¶16)

7. The Bruins are a hockey club that plays its home games in Boston, Massachusetts at the TD Garden. (Stip ¶17 and ¶77)

8. The TD Garden is owned and operated by Delaware North Companies, Inc. - Boston ("DNC-Boston") a wholly owned subsidiary of Delaware North Companies, Inc. ("Delaware North") (Stip ¶248 and ¶249)

9. Petitioner is the Chairman of the Board of Directors of Delaware North and prior to January, 2015 was its CEO. (Stip ¶244 and ¶243)

10. BPHA was a party to a lease with DNC-Boston, which required BPHA to play all of its home games at the TD Garden for a nominal amount. (Ex. 578-J BRU0000533, 579-J BRU0000550; Stip ¶251)

11. Petitioner has been the principal owner of the Bruins since 1976, representing the team on the NHL's Board of Governors. (Stip ¶240 and ¶241)

12. In June of 2007, petitioner was elected Chairman of the NHL's Board of Governors. (Stip ¶242)

Structure of the NHL and Seasons of Play

13. During the years at issue, the NHL included 30 clubs divided between two conferences, the Eastern Conference and Western Conference with the Eastern composed of NHL clubs generally located in the eastern United States and Canada. (Stip ¶22 and ¶26)

14. NHL clubs that are in geographical proximity to one another generally comprise the divisions within each conference. (Stip ¶27)

15. During the years at issue, BPHA (hereafter at times "the Bruins") was assigned to the NHL's Northeast Division in the Eastern Conference. (Stip ¶71)

16. During the years at issue, the NHL was governed by a Constitution and By-Laws that bound member clubs. (Stip ¶19 and ¶20, Ex. 90-J and 10-J)

17. The relationship between the NHL, its member clubs, and the players of the clubs was governed, in part, by a Collective Bargaining Agreement ("CBA") between the NHL and the National

Hockey League Players' Association. (Stip ¶21, Ex. 11-J)

18. NHL seasons typically begin in September and conclude in June of the following year composed of a pre-season, regular season, and post-season. (Stip ¶28 and ¶29)

19. Pre-season games are played in September and early October, and post-season games are played from mid-April through June, with regular season games played in October through mid-April. (Stip ¶30 and ¶31)

20. The NHL seasons associated with the years at issue are the 2008-2009, 2009-2010, and 2010-2011 seasons. (Stip ¶32)

21. NHL clubs play both home and away games with away games generally requiring a club to travel to an arena of a different NHL club. (Stip ¶34 - ¶36)

22. Pre-season away games generally do not involve overnight stays in an away game destination city. (Stip ¶38, Ex. 12-J BRU0000517, 0521)

23. Regular season games comprise the majority of games played during an NHL season, usually composed of 41 home games and 41 away games. (Stip ¶41)

24. During 2009, the BPHA played 84 regular season games, 37 away and 47 at home. (Ex. 12-J)

25. During 2010, the BPHA played 79 regular season games, 41 as the away team and 38 as the home team. (Ex. 12-J)

26. Though designated a home team, against the Philadelphia Flyers on January 1, 2010, BPHA played the game at Fenway Park, staying the night before at the Westin Boston Waterfront hotel. (Ex. 12-J BRU0000518, 330-J BRU0000260, 607-J, 197-J)

27. Post-season games are structured as an elimination tournament consisting of four rounds of best-of-seven games series. (Stip ¶43)

28. In 2009, BPHA played 11 post-season games, with five away and in 2010, 13 post-season games with six away. (Exhibit 12-J)

The NHL Constitution, By-Laws, and CBA

29. The NHL Constitution and By-Laws obligate NHL clubs to play regular season and post-season games both at home and away. (Stip ¶40 and ¶47)

30. Pursuant to the NHL Constitution, each NHL club conveyed, granted, and assigned forever all right, title and interest which it might have had in and to each hockey game played by its team as a visiting club to the NHL member club in whose home territory said game is played. (Stip ¶50 Ex. 9-J BRU0002136; Stip ¶286)

31. Consistent with the NHL Constitution, during the years at issue, BPHA did not receive revenues from regular season ticket sales for games played as a visiting team. (Stip ¶52,

¶153, ¶284, ¶285)

32. The Form of Standard Club Rules of the CBA addresses player responsibilities and sanctions for breaches. (Ex. 11-J BRU0001951-1952)

33. The Form of Standard Club Rules does not contain the words "meal(s)", "pre-game meal(s)", "breakfast", "lunch", "snack", or "brunch." (Ex. 11-J BRU0001951-1952)

34. The Form of Standard Club Rules requires players must be on time for all Club practices, games, meetings and other mandatory Club events, listing in subparagraphs (a)-(d) mandatory Club events, none describing meals. (Ex. 11-J BRU0001951)

35. BPHA did not fine any player in the years at issue for failing to attend the pre-game meals at the away city destinations although a player was scratched in 2011 for missing a meeting. (Stip ¶300, ¶153, Ex. 571-J and 573-J BRU0000003)

BPHA's Business Activities

36. BPHA's business activities include hockey operations, scouting, executive, and business operations functions. (Stip ¶175)

37. According to the audited financial statements of BPHA for the years ending June 30, 2010 and 2009, and for the years ending June 30, 2011 and 2010, BPHA was engaged in the operation

of the Bruins which was located in Boston, Massachusetts. (Stip ¶253, Ex. 578-J BRU0000530, 579-J BRU0000546)

38. BPHA operated a sports shop located in Boston, open 7 days each week with extended operation times during home games. (Stip ¶253 to ¶255, Ex. 578-J BRU0000530, 579-J BRU0000546)

39. BPHA generates revenue primarily from ticket sales at home games, television and radio broadcasting, and retail sales from its sports shop. (Ex. 578-J BRU0000530, 579-J BRU0000546)

Office Activities

40. During the years at issue, BPHA and Deeridge maintained offices for officers and staff at 100 Legends Way, Boston, MA 02114 where the books and records of those entities were located. (Stip ¶261, ¶262, ¶298, and ¶299)

41. The Club Directories for BPHA for the applicable seasons list, respectively, 102, 109, and 106 owners, staff, and executives, not including the players and secretarial staff. (Stip ¶263, Ex. 580-J)

42. Of the listed individuals, all were employees of BPHA other than (1) four individuals listed as Owners or Executives, (2) three medical persons, and (3) ten persons listed as TD Garden employees. (Stip ¶264, Ex. 580-J)

43. Of the listed individuals on the Club Directories, all worked at BPHA's office address other than the aforementioned 4

Owners and Executives and 3 medical persons. (Stip ¶265)

44. The office employees of BPHA, hereafter meaning employees of Deeridge, BPHA, or TD Garden, worked throughout the calendar years 2009 and 2010, including during the off-season. (Stip ¶266)

45. While the players, coaches, and hockey support staff are in Boston, the officers and staff at BPHA's offices continue their normal business operations. (Stip ¶170)

46. Activities of the office employees included performing functions related to media relations, payroll, accounting, and financial statements, and secretarial support for the President, General Manager, and Vice Presidents of Sales, Finance, and Marketing. (Stip ¶267 and ¶268)

47. Operations of the BPHA employees who remained in Boston during away games included activities in the ticketing, marketing, community relations, media relations, finance, and legal departments. (Stip ¶269)

48. To the extent not travelling, equipment purchases and travel arrangements in support of the away games were made from BPHA's offices by the pertinent employees. (Stip ¶270 and ¶271)

49. General Manager Peter Chiarelli and Assistant General Managers Jim Benning and Don Sweeney negotiated player contracts from BPHA's offices when not travelling, although Messrs.

Benning and Sweeney rarely travelled. (Stip ¶272, ¶273, ¶138, Ex. 486-J to 570-J)

50. Vice President, Business Operations, Daniel Zimmer; President, Cam Neely; and Senior Vice President, Sales and Marketing, Amy Latimer negotiated television and radio broadcast contracts from their BPHA offices. (Stip ¶274, ¶275, ¶138, Ex. 386-J to 570-J)

51. Vice President, Finance, James Bednarek and Controller, Richard McGlinchey negotiated contracts for insurance from their BPHA offices and did not travel to away games. (Stip ¶276 ¶277, ¶138, Ex. 486-J to 570-J)

52. Assistant General Counsel, Matthew Reece registered trademarks for BPHA from his office and did not travel to away games. (Stip ¶278 ¶279, ¶138 Ex. 486-J to 570-J)

53. Mr. Neely and Ms. Latimer were engaged in approving the final design for Bruins' logos and trademarks from their offices. (Stip ¶280)

54. The Finance Department of the Bruins (whether Deeridge's or BPHA's) was located at the 100 Legends Way address and included seven (7) employees: a CFO, Controller, Senior Accountant, Payroll Manager, Staff Accountant/Accounts Payable Manager, Staff Accountant, and a shared finance administrative assistant who continued to work during away games. (Stip ¶281

to ¶283)

At Home

55. BPHA's practice and training facility in Massachusetts is the Ristuccia Memorial Arena Ice Skating Rink ("Ristuccia") located in Wilmington, Mass., which is open all year. (Stip ¶76, ¶204, Tr. 138.7-19)

56. Players begin training for an upcoming hockey season a few weeks after the conclusion of the prior season, and their off-season conditioning is monitored by their coaches. (Stip ¶205; Tr. 11.10-22, Tr. 31.23-32.2, Tr. 137.3-8)

57. Players train all the time, all year, some continually in Boston and at Ristuccia during the off-season. (Tr. 35.4-12; Tr. 137.1-138.3)

58. At the TD Garden, BPHA played 55 games in 2009, including pre-season, regular, and playoff games, and 45 games in 2010. (Ex. 12-J)

59. When not in a travel status or on home game day, the team regularly has practices at Ristuccia. (Ex. 325-J to 335-J, 337-J to 357-J, 359-J to 364-J, 366-J, 368-J to 373-J, 375-J to 377-J, 380-J to 396-J, 401-J, 403-J, and 404-J)

60. During the years at issue, when BPHA had a home hockey game, it was the player's responsibility to get to the TD Garden on time. (Stip ¶207)

61. For a home game scheduled for the evening, players usually got to the arena by 9:30 a.m., one hour prior to the morning practice skate usually scheduled to commence at 10:30 a.m. (Stip ¶208)

62. Game day morning practice at the TD Garden was usually scheduled to last 45 minutes to 1 hour, but players did not skate for the full time allotted, usually only 10-15 minutes. (Stip ¶209, ¶210, and ¶211)

63. It is mandatory for players to be present at the practice skate at the TD Garden prior to a game. (Stip ¶213)

64. At ice-skating practices, coaches meet with players and give direction with game day advice more strategy focused than exercise drills. (Stip ¶214 and 215)

65. On home game days, players may eat breakfast at home and are responsible for their choice of breakfast fare. (Stip ¶216 and ¶218; Tr. 102.8-20)

66. After the morning practice skate on a home game day, players may stretch, undergo physical therapy with staff, or get a massage from the team's Massage Therapist. (Stip ¶219 and ¶220)

67. After the morning practice skate on a home game day, the BPHA provided a non-mandatory pre-game meal in a 6th floor VIP room for the players usually starting at 11:00 a.m. (Stip

¶221 and ¶224, Tr. 101.9-16)

68. Power Play and Penalty Kill meetings usually take place around 9:45 a.m. or 9:50 a.m. (Stip ¶228)

69. In small groups or in one-on-one meetings, coaches show video clips to players, though usually video review is undertaken in an assistant coach's office. (Stip ¶229 and ¶230)

70. When a larger group needs to meet, they sit together in a larger conference room rather than an assistant coach's office, where video may be displayed on a wall-mounted flat screen monitor. (Stip ¶231 and ¶232; Tr. 44.10-14)

71. After the pre-game meal, players may return to their residences for afternoon rest or naps prior to the scheduled home game. (Stip ¶233)

72. Players are required to be back to the TD Garden on a home game day at 5:00 p.m. for a 7:00 p.m. scheduled game. (Stip ¶234)

73. Players receive medical treatments at their home rink in Boston, at the away game arena rink, and at the hotel. (Tr. 41.1-4, Tr. 40.3-11, Tr. 134.21-23)

74. Coaches discuss game strategy while home in Massachusetts as a daily matter. (Tr. 50.3-14)

75. Film review of the team may occur at Ristuccia prior to a flight departure for an away game. (Tr. 52.3-8)

76. Film review of the team and of their opposition occurs in Boston when at home, at the away-city hotels, and at the away game arena rink. (Tr. 25.16-19; Tr. 50.23-51.20; Tr. 88.12-24; Tr. 90.6-19; Tr. 92.5-14; Tr. 98.16-24)

Travel Planning

77. During the 2008-2009 and 2009-2010 NHL seasons, Ryan Nadeau was BPHA's Manager of Hockey Administration, becoming Director of Hockey Administration & Scout for the 2010-2011 NHL season. (Ex. 580-J)

78. After the NHL promulgated the Calendar of upcoming games in late June or early July, Mr. Nadeau would contact hotels in the destination cities to ensure sufficient rooming availability. (Stip ¶57, ¶82, ¶84, ¶85, ¶108, Tr. 144.16-22)

79. BPHA's travelling operations complement consisted of between 20 and 24 players, usually 23, and varying numbers of additional personnel, including the head coach and assistant coaches, plus staff consisting of medical personnel, trainers, equipment managers, communications personnel, travel logistics managers, public relations/media personnel, and other employees. (Stip ¶78; Ex. 487-J to 520-J, 522-J to 570-J))

80. The travelling group would regularly stay at the destination city hotel the night before the away game during the regular season and post-season. (Stip ¶80, Ex. 404-J BRU0000274)

81. Sometimes the team would arrive at a destination city 2 days before a scheduled game day. (Ex. 339-J BRU0000294, 338-J BRU0000292-0293, 325-J BRU0000242, 326-J BRU0000244 and 0247, 328-J BRU00000254-0256, 363-J BRU0000439)

Travel Planning - Hotel Contracts

82. The hotel contracts contain provisions for BPHA to indicate whether the team sought to have the hotel provide a game day meal (usually breakfast, lunch, and snack), time periods for the meal, and the expected number of attendees. (Stip ¶96)

83. The hotel contracts nearly always contained a provision that the hotel would provide a private room or function space for the meals, complementary. (Stip ¶92 and ¶93)

84. In over a third of the 58 exhibited hotel contracts (Ex. 14-J to 72-J), the hotels expressly reserved the right to change the meeting room. (Ex. 17-J BRU0000040; 19-J BRU0000052, 20-J BRU0000062, 23-J BRU0000090, 28-J BRU0000133, 29-J BRU0000138, 30-J BRU0000145, 31-J, 36-J, 39-J to 42-J, 50-J, 53-J to 56-J, 65-J, 69-J and 71-J)

85. The change in the meeting room or function space was usually tied to a decrease in the actual number of attendees versus the number of expected attendees. (Ex. 30-J BRU0000145, 31-J BRU0000152, 39-J BRU0000718, 40-J BRU0000725, 41-J

BRU0000731, 42-J BRU0000741, 50-J BRU0000786, 19-J, 20-J, 54-J to 56-J, 65-J, and 69-J)

86. None of the exhibited hotel contracts are titled as "Leases" with two actually titled "Group Room Agreement". (Ex. 17-J to 72-J; 47-J and 61-J)

87. Without exception, each hotel contract discusses the reservation of guest rooms or blocks of rooms, and only thereafter discusses team meals, with two contracts making no mention of meals. (Ex. 14-J to 72-J; Ex. 38-J and 47-J)

88. Ten (10) of the hotel contracts expressly provide that the provision of the private room or function space for the team meals on a complementary basis was contingent upon the number of reserved sleeping rooms. (Stip ¶93, Ex. 19-J BRU0000052, 20-J BRU0000062, 54-J BRU00000806-0807, 69-J BRU00000895-0896, 34-J BRU00000173-0174, 35-J, 37-J, 42-J, 53-J and 58-J)

89. Two (2) of the hotel contracts expressly provide that the provision of the private room or function space on a complementary basis was contingent on an expected level of food and beverage revenue. (Ex. 62-J BRU00000852 and 63-J BRU00000857)

90. Regarding the meals, most of the hotel contracts contain an area on the document for the per meal expected number of attendees. (Ex. 14-J to 20-J, 22-J, 23-J to 37-J, 39-J to

44-J, 46-J, 48-J to 50-J, 69-J to 72-J)

91. Mr. Nadeau would usually execute the hotel agreements in August for the upcoming hockey season. (Ex. 14-J to 20-J, 32-J to 37-J, 60-J to 69-J)

92. Mr. Nadeau would carefully review the contracts, and when BPHA sought changes to the hotel agreements Mr. Nadeau would handwrite those changes on the document and initial those changes. (Stip ¶109; Tr. 159.12-14)

93. Mr. Nadeau made changes on the hotel agreements to the expected number of attendees at the meals on thirteen (13) of the exhibited hotel agreements. (Ex. 16-J, 17-J, 27-J, 30-J, 32-J to 34-J, 37-J, 40-J, 41-J, 48-J, 49-J, and 60-J)

94. Mr. Nadeau made changes on the hotel agreements to the type of requested meals, to the time for the meals, and the dates for the meals. (Ex. 14-J, 15-J, 17-J, 26-J to 28-J, 33-J, 37-J, 48-J, 49-J, 52-J, 53-J, 60-J, 61-J)

95. Mr. Nadeau made changes on the hotel agreements to the number and type of reserved rooms. (Ex. 14-J, 21-J, 25-J, 27-J, 32-J, 34-J, 40-J, 50-J, 51-J, 53-J, 57-J, 59-J, 60-J, 61-J, and 71-J)

96. By his initials next to the grids regarding the meal attendees and on the pages bearing the grids, Mr. Nadeau confirmed the number of expected meal attendees. (Ex. 44-J

BRU0000751, 56-J BRU00000819, 22-J BRU0000083)

97. Based upon the room reservations, the contracting hotels expected receipt of guest room revenues. (Ex. 19-J, 35-J, 24-J, 28-J, 29-J, 32-J, 34-J, 36-J, 37-J, 41-J, 54-J, and 56-J)

98. Based upon the meal reservations, the contracting hotels expected receipt of food and beverage revenues. (Ex. 19-J BRU0000054, 23-J BRU0000093, 24-J BRU0000110, 28-J BRU0000133, 29-J BRU0000138, 34-J to 36-J, 46-J, 47-J, 54-J, 56-J, and 71-J)

99. The hotel contracts regularly contained provisions for the payment of damages due to contract cancellation. (Ex. 15-J, 17-J to 20-J, 22-J to 24-J, 27-J to 42-J, 44-J to 49-J, and 51-J to 69-J)

100. Contract cancellation damages to the hotels included lost revenue from expected room revenue and food and beverage revenue. (Ex. 19-J BRU0000054, 20-J BRU0000064, 23-J BRU0000093, 36-J BRU0000188, 39-J BRU0000719, 46-J BRU0000766, 55-J BRU0000816, and 61-J BRU0000847)

101. The hotel contracts regularly contained provisions addressing attrition in the number of reserved rooms and meal attendees. (Ex. 15-J, 18-J to 22-J, 24-J, 27-J, 30-J to 32-J, 34-J to 37-J, 39-J to 42-J, 44-J, 46-J, 48-J, 49-J, 54-J, 56-J, 58-J, and 65-J)

102. Some hotel contracts expressly stated that the BPHA

would be liable for damages caused to the private room or function space. (Ex. 22-J, 24-J, 27-J, 30-J, 31-J, 40-J to 41-J, 46-J, 50-J, 58-J, and 70-J)

103. Mr. Nadeau was named the beneficiary of the applicable hotel's client loyalty rewards plan in a number of hotel contracts. [Ex. 15-J, 18-J, 24-J, 46-J, 32-J, 35-J, 58-J, 70-J, 71-J (Starwood Preferred Planner Points - Westin Hotels); Ex. 50-J (Marriott Rewards Points); Ex. 62-J and 63-J (HHonors - Hilton Worldwide)]

104. During the years at issue, Mr. John Bucyk was "Team Road Services Coordinator" and would regularly travel with the team to away games. (Stip ¶263, Ex. 580-J, Tr. 59.2-10)

105. Mr. Nadeau did not travel with the team to the regular season away games during the years at issue, naming Mr. Bucyk to the hotels as the on-site authorized representative able to sign for BPHA. (Tr. 144.2-6, Ex. 33-J BRU0000163, 37-J BRU0000198, 51-J BRU0000788, 52-J, 56-J, 66-J BRU0000881, 67-J BRU0000886, and 68-J)

106. At the away city hotels, Mr. Bucyk took attendance at the door to the room where breakfasts were held. (Tr. 66.23-67.12)

107. At the Sofitel hotel in Montreal, it was required of BPHA that the team has an authorized representative at each meal

to verify that charges on the check were correct and sign if correct. (Ex. 19-J BRU0000052, 20-J BRU0000062, 54-J BRU00000807, 69-J BRU00000896)

108. At The Lofts Hotel, it was required of BPHA that the team's authorized representative sign all banquet checks at the completion of each meal. (Ex. 39-J BRU00000718)

109. In the hotel contracts discussing the provision of meals, meal pricing was regularly expressed on a per capita basis. (Ex. 14-J to 18-J, 23-J, 28-J, 29-J, 35-J to 37-J, 53-J, 56-J, 60-J, 64-J, and 70-J)

110. At the Sofitel in Montreal and at the Marriott Long Island, BPHA guaranteed a number of meal attendees, which number was not subject to reduction, and which number would be the minimum number upon which the hotel's meal charge would be based. (Ex. 19-J BRU0000052, 20-J, 54-J, 69-J, 31-J BRU00000152) 40-J and 41-J)

111. Similar provisions regarding minimum guaranteed number of attendees or meal costs based upon actual attendees, including surcharges for extra attendees, existed in other hotel contracts. (Ex. 36-J BRU00000167; 37-J BRU00000194, 135-J; 58-J BRU00000832; 39-J BRU00000718; 55-J BRU00000815; 55-J BRU00000815; 55-J BRU00000815)

112. Of the exhibited 58 contracts, most contracts were

for a single overnight stay. (Ex. 19-J, 23-J to 26-J, 29-J to 36-J, 40-J and 41-J, 43-J to 46-J, 48-J, 54-J, 58-J, 60-J, 62-J to 64-J, 66-J, 68-J, 69-J, 71-J, and 72-J)

113. Five (5) contracts were for multiple nonconsecutive one-night-stays over the hockey season. (Ex. 14-J, 27-J, 45-J, 50-J, and 51-J)

114. Twenty-one contracts show BPHA had reserved rooms for consecutive nights, none exceeding two consecutive nights. (Ex. 15-J to 18-J, 20-J, 22-J, 28-J, 37-J to 39-J, 42-J, 47-J, 49-J, 52-J, 53-J, 55-J, 57-J, 61-J, 65-J, 67-J, and 70-J)

115. In those contracts wherein BPHA requested the hotels provide meals during the regular season, meals were requested to be provided only on the days of the hockey game, leaving the players free to eat on their own elsewhere on layover days. (Tr. 85.22-23; Ex. 15-J to 18-J, 20-J, 22-J, 28-J, 37-J, 39-J, 42-J, 61-J, 65-J, 67-J, and 70-J)

116. The hotel contracts regularly contained a start-time and an accompanying end-time for each meal. (Ex. 39-J to 42-J, 46-J, 48-J, 49-J, 53-J to 56-J, 58-J, 60-J, 62-J to 65-J)

117. The hotel contracts advised BPHA that the food and beverage charges are subject to applicable sales taxes and service and/or gratuity charges. (Ex. 27-J to 32-J, 34-J to 36-J, 39-J to 44-J, 46-J, 48-J to 50-J, 54-J, 56-J, 58-J, 60-J to

65-J, and 69-J)

Travel Planning - Banquet Event Orders

118. At a date more proximate to the actual travel date, BPHA, by Mr. Nadeau, executed a Banquet Event Order ("BEO") which states the date, time, room, number of guests, menu and per person pricing for each meal that BPHA ordered. (Stip ¶104 and ¶105)

119. Of the exhibited 96 BEOs, Mr. Nadeau made changes to 56 for quantities of food, types of food, and meal times, some changes of only 15 minutes. (Stip ¶109 and ¶110, Ex. 82-J, 87-J, 97-J, 100-J to 102-J, 108-J, 110-J, 111-J, 114-J, 120-J to 126-J, 128-J to 134-J, 136-J to 138-J, 140-J, 142-J to 148-J, 151-J, 154-J to 156-J, 158-J, 161-J to 164-J, 166-J to 177-J)

120. Mr. Nadeau made additions or changes to the expected or guaranteed number of attendees for thirteen (13) meals on ten (10) of the exhibited BEOs. (Ex. 123-J, 140-J, 144-J, 145-J, 148-J, 164-J, 170-J, and 172-J to 174-J)

121. The BEOs consistently expressed the applicable meal cost on a per person basis and the expected number of attendees. (Ex. 82-J to 178-J)

122. Nearly all of the exhibited BEOs stated the food and beverage costs were subject to service charges and applicable sales taxes. (Ex. 99-J to 116-J, 118-J to 128-J, 130-J to 133-

J, 135-J to 144-J, 146-J to 162-J, 164-J to 168-J, 170-J to 175-J, 177-J, and 178-J)

123. In some of BEOs the hotels reserved the right to change the room where meals were to be available. (Ex. 109-J, 132-J, 154-J, 165-J, and 168-J)

124. The BEO for the Westin Hotel in New York, NY expressly advised that meal charges would be based on the guaranteed number of attendees or the actual number of attendees, whichever was higher. (Ex. 126-J)

Travel Planning - Rooming Lists

125. In advance of each trip, Mr. Nadeau prepared a Rooming List for the hotel that set forth those travelling hockey employees, players, coaches, executives, and staff who were to stay at the away city hotels and in what type of room each individual was to be assigned, for instance which players were to be assigned single rooms and which players were to be assigned a double room with another player. (Stip ¶138, Tr. 163.24-25, Tr. 164.8-16; Ex. 487-J to 520-J, 522-J to 570-J)

Travel Planning - Calendars, Monthly/Daily/Trip Itineraries

126. In order to inform players of their home and away game schedule, BPHA provided the players monthly Team Schedules, and monthly, daily, road trip, and playoff itineraries. (Stip ¶122, Ex. 325-J to 334-J, 382-J to 388-J; Stip ¶125, 403-J and

404-J; Stip ¶123, Ex. 335-J to 340-J; Ex. 341-J, 344-J, 346-J, and 347-J)

127. The itineraries reflect that in 2009 for regular and post-season the air flights arrived at the destination cities between 7:00 a.m. to 7:00 p.m. 24 times. (Ex. 339-J, 338-J, 343-J, 342-J, 347-J, and 346-J)

128. The itineraries reflect that in 2010 for regular and post-seasons the air flights arrived at the destination cities between 7:00 a.m. to 7:00 p.m. 26 times. (Ex. 325-J, 326-J, 328-J, 362-J to 366-J, and 368-J)

Travel

129. BPHA's travelling personnel went to the away games on charter flights. (Stip ¶131)

130. When travelling from an airport in the Boston area other than Boston's Logan Internal Airport, for example from Hanscom Field Airport, each member of the travelling complement needed to arrange for his or her own transportation to the departure airport. (Stip ¶133)

131. Upon the flight's arrival in the away city, BPHA's travelling group took a chartered bus directly from the airport to the away city hotel. (Stip ¶136)

132. Upon arrival at the destination city hotel, players could use any available free time as they saw fit, such as

exploring the away city and going out to eat dinner, subject to BPHA's 11:00 p.m. curfew. (Stip ¶142 ¶143, and ¶145)

133. Upon arrival at the hotel, if time permitted, (a) players may receive physical therapy, massages, and other medical treatments; (b) players may exercise and perform strength conditioning in their room or the hotel fitness center; (c) coaching staff may meet to discuss game strategy, review video, and discuss player issues; and (d) coaching staff may meet with players to discuss game strategy, discuss player issues, and review game video, although video review on the arrival day was infrequent. (Stip ¶139 and ¶140)

134. On travel days when the team departs from the Boston area and has already practiced earlier that morning, most player meetings with coaches and trainers occur on the practice ice at Ristuccia before or after practice. (Stip ¶141)

135. Practices at either Ristuccia or TD Garden regularly occurred prior to the flights departing from Massachusetts on non-home game days. (Ex. 339-J, 338-J, 343-J, 342-J, 347-J, 341-J, 344-J, 387-J, 398-J, 400-J, 401-J, 402-J, and 383-J)

136. The practices at either Ristuccia or TD Garden prior to flight departure on travel days lasted from one to two hours. (Ex. 326-J)

137. On layover days at a destination city, BPHA regularly

held practices, sometimes at private arenas and universities.

(Ex. 339-J, 338-J, 343-J, 325-J, 326-J, 328-J, 366-J, 368-J, 341-J, 344-J, 397-J, 400-J, and 383-J)

138. In 2009, from repeat visits for regular season play, the nights at any destination city aggregated to one to six, most often for only 1 or 2 nights. (Ex. 339-J, 338-J, 343-J, 342-J, 325-J, 326-J, and 328-J; Ex. 14-J to 18-J, 22-J to 25-J, 27-J, 30-J, 33-J, 36-J, 39-J to 46-J, 48-J, 51-J, 52-J, and 54-J to 58-J)

139. In 2010, from repeat visits for regular season play, the nights at any destination city aggregated to one to six, with 4 nonconsecutive nights being the most common at Toronto, Montreal, Tampa, Atlanta, and Short Hills, NJ. (Ex. 362-J to 366-J, 368-J to 371-J, 374-J, 387-J, 397-J to 402-J, and 383-J; Ex. 16-J to 20-J, 26-J, 28-J, 29-J, 31-J, 32-J, 34-J, 35-J, 47-J, 49-J to 53-J, 60-J to 72-J)

140. Some hotel stays in the same city were at different hotels in the same tax year. (Ex. 24-J and 25-J; 17-J and 60-J; 66-J and 67-J; and 26-J and 71-J)

Away Game Day - Breakfast

141. When the hockey game is scheduled for the evening, the team has a pre-game breakfast, generally scheduled for 8:00 a.m. to 10:00 a.m., local time. (Stip ¶147 and ¶148)

142. Players arrive individually for breakfast during the ascribed time period. (Stip ¶150)

143. Players and coaches eat the breakfast together but public relations staff and other staff are excluded until after the meal. (Tr. 48.20-25)

144. At breakfast, coaches may speak to players in small groups or one-on-one, including reviewing game video on laptop computers, though one-on-one meetings at breakfast are not normally done. (Stip ¶157 and ¶158)

145. After eating, at the end of the time period for breakfast, team meetings are held by the players. (Stip ¶159)

146. One type of regularly held meeting is called a Power Play meeting where discussion is held about offensive strategy after penalties have been incurred by the opposing team. (Stip ¶160)

147. Another type of regularly held meeting is called a Penalty Kill meeting where discussion is held about defensive strategy after penalties have been incurred by the team. (Stip ¶161)

148. A video recording was taken of a meeting held after a pre-game breakfast which was conducted by head coach Claude Julian in 2013 at the Westin Hotel in Ottawa Canada depicting a breakfast meeting which shows the eating table set-up, buffet

table set-up, player and coach positioning with no food being consumed or visible. (Stip ¶162 Ex. 574-J)

Away Game Day - Morning Practice

149. Following the pre-game breakfast and the Power Play and Penalty Kill meetings, the players usually travel to the opposing NHL club's arena or a practice facility on a chartered bus provided by BPHA. (Stip ¶163 and ¶164)

150. When an itinerary states "Ice Available" after morning breakfast, the players who are not scheduled to play the hockey game go to the practice. (Stip ¶172; Ex. 404-J BRU0000277 and 329-J BRU0000259)

151. When an itinerary indicates, "Morning Skate" or "Pre-Game Skate" after breakfast at an away city destination, it is mandatory for all players to be present at the practice. (Stip ¶171, Ex. 404-J BRU0000277 and 329-J BRU0000259))

152. In 2009, most regular season games, and all post-season games, were played at 7:00 p.m. or later local time. (Ex. 338-J to 340-J, 342-J, 343-J, 404-J, 325-J, 326-J, and 328-J; 346-J and 347-J)

153. Of the 37 regular season away games played in 2009, 28 were played on or after 7:00 p.m. (Ex. 338-J, 339-J, 342-J, 343-J, 325-J, 326-J, and 328-J)

154. Of the 33 away games played in 2009, regular season

and post-season, with games played at 7:00 p.m. or later, bus departure from the hotel for pre-game skate practice was at 10:15 a.m. with practice scheduled for 11:30 a.m. to 12:30 p.m. (Ex. 338-J, 339-J, 342-J, 343-J, 325-J, 326-J, 328-J, 346-J, and 247-J)

155. In 2010, most regular season and post-season games were played at 7:00 p.m. or later local time. (Ex. 404-J, 362-J, 363-J, 364-J, 365-J, 366-J, 368-J, 369-J, 370-J, 371-J; 12-J, 341-J, 344-J)

156. Of the 41 regular season away games played in 2010, 33 were played on or after 7:00 p.m. (Ex. 362-J to 366-J, 368-J to 371-J, 374-J, 387-J, 397-J to 402-J)

157. Of the 44 away games played in 2010, regular season and post-season, with games played at 7:00 p.m. or later, bus departure from the hotel for pre-game skate practice left at 10:15 a.m. with practice scheduled for 11:30 a.m. to 12:30 p.m. (Ex. 362-J to 366-J, 368-J to 371-J, 374-J, 387-J, 397-J to 402-J, 341-J, and 344-J)

158. At the practice on an away game day, players usually do not skate for the entire practice time available. (Stip ¶166)

159. Team meetings by players with coaches occur at the away game arena rinks. (Tr. 51.2-20; Tr. 82.7-14; Tr. 90.6-19;

Tr. 98.9-24)

160. Coaches meet with trainers at the away city arenas at times. (Tr. 135.10-14)

161. Coaches meet together sometimes at away city restaurants outside of the away-city hotels. (Tr. 54.5-11)

Away Game Day - Lunch and After

162. When the hockey game is scheduled for the evening, the team has a pre-game lunch, generally scheduled for 12:15 p.m. to 2:15 p.m. (Stip ¶173 and ¶175)

163. Since the team returns to the hotel together on the bus from the morning's ice practice, the players are generally together when eating lunch but Mr. Bucyk does not regularly take attendance. (Stip ¶176; Tr. 84.2-4)

164. Players and coaches eat the lunch together but public relations staff and other staff are excluded until after the meal. (Tr. 82.21-83.1)

165. Players usually rest after lunch. (Stip ¶180)

166. When the hockey game is scheduled for the evening, BPHA makes available to the players a pre-game snack, generally scheduled between 3:15 p.m. and 5:15 p.m., or 3:30 p.m. and 5:30 p.m., but it is not mandatory for players to attend or eat the snacks. (Stip ¶18, ¶183 and ¶184)

167. The hotel contracts and BEO regularly reflect a

reduced number of expected attendees for the snacks, usually 15, versus the number of attendees for breakfast and lunch. (Ex. 15-J, 16-J, 20-J, 28-J, 42-J; Ex. 98-J, 104-J, 121-J)

168. Following the pre-game snack and 2.25 hours before the game, the team departs for the away city arena using a bus chartered by BPHA. (Stip ¶185)

Away Game Day - Brunch

169. When the team plays an away city game in the afternoon, BPHA has a pre-game brunch usually scheduled between 8:00 a.m. and 12:30 p.m. (Stip ¶186 to ¶188)

170. At brunch, coaches may conduct small group meetings and individual one-on-one meetings. (Stip ¶190)

171. After brunch and 2.25 hours before the game, the team departs for the away city arena by chartered bus. (Stip ¶192)

Game and Post-game

172. Meetings between players and coaches may also occur at the away city arena right before the scheduled hockey game. (Stip ¶191)

173. Each NHL hockey game includes 60 minutes of playing time and lasts around 150 minutes from start to finish, after which the team generally remains at the arena for an hour during which the players shower, change, and meet with media. (Stip ¶194 and ¶195)

174. When they leave the away city arena, the team boards a chartered bus to go directly to the away city airport for travel to the next away city or back to Massachusetts. (Stip ¶196)

Meals

175. The pre-game meals are provided in a conference room or banquet room at the away city hotel with no signage outside the room for privacy. (Stip ¶197 and ¶199)

176. The setup of the conference room or banquet room for the pre-game meals usually consists of round tables with chairs and buffet stations where food is available for self-service. A chef is typically available at breakfasts to prepare omelets. (Stip ¶198)

177. The pre-game lunch usually consisted of 70 portions of protein and other foods due to the caloric requirements of professional athletes. (Stip ¶200, Tr. 175.21-176.2, Tr. 120.2-10)

178. The pre-game breakfast or brunch regularly included scrambled eggs with bacon, and pasta with alfredo sauce, ice cream with toppings, and cookies available for lunch or brunch. (Ex. 82-J, 87-J, 90-J, 93-J, 96-J, 99-J, 100-J, 103-J to 105-J, 107-J to 178-J; Stip ¶200, Ex. 83-J, 86-J, 94-J, 97-J, 101-J, 103-J to 105-J, 112-J to 141-J, 144-J to 149-J, 151-J to 178-J)

179. All the food options available on the pre-game meal buffets remain consistent from hotel to hotel. (Stip ¶201)

Accounting Logistics

180. The expenses for pre-game meals at the hotels are invoiced together with the room charges but separately itemized from the room charges. (Stip ¶111, ¶112, and ¶113)

181. The meal charges are credited to Deeridge's financial account "Team meals" (account #534278). (Stip ¶115)

182. All invoiced charges for rooming and meals for the away city destinations are paid from the Boston offices of BPHA. (Stip ¶116)

183. Mr. Nadeau reviewed the invoices for accuracy and prepared a Hockey Operations Memo totaling the amount due to the respective hotel. (Stip ¶118, Tr. 179.20-24)

184. After approval for payment by Mr. Chiarelli, Mr. Nadeau would send his Hockey Operations Memo to BPHA's Finance department. (Stip ¶120; Stip 2 ¶ 308, Ex. 561-J to 649-J)

185. The invoices, banquet checks, and similar statements from the hotels regularly reflect pre-game meal charges calculated upon a per capita basis, with both base charge and number of persons served, and the imposition of sales tax on the meal charge. (Stip ¶117, Ex. 179-J to 187-J, 189-J to 191-J, 193-J to 199-J, 201-J to 218-J, 220-J to 225-J, 228-J, 230-J to

235-J, and 237-J to 242-J)

186. The most frequent number of BPHA travelers (players, coaches, staff, and executives) was 36 per the Rooming Lists or 35 per the Hockey Operations Memos. (Ex. 487-J to 520-J, 522-J to 570-J; Stip ¶118 Ex. 591-J to 649-J, 243-J to 324-J)

187. The most frequent number of attendees for breakfast and brunch per the invoices, banquet checks, and similar statements (or in the absence of such invoices the BEOs, secondly, or hotel contracts, thirdly) was 25. (Ex. 179-J to 187-J, 189-J to 191-J, 193-J, 194-J, 196-J to 198-J, 201-J, 204-J, 205-J, 207-J, 209-J to 213-J, 215-J to 218-J, 220-J, 221-J, 223-J, 225-J, 228-J, 232-J, 234-J, 235-J, 237-J, 239-J, 241-J, and 242-J)

188. The most frequent number of attendees for lunch per the invoices, banquet checks, and similar statements (or in the absence of such invoices the BEOs, secondly, or hotel contracts, thirdly) was 25. (Ex. 179-J to 187-J, 189-J to 191-J, 193-J, 194-J, 196-J to 198-J, 201-J, 204-J, 205-J, 207-J, 209-J to 213-J, 215-J to 218-J, 220-J, 221-J, 223-J, 225-J, 228-J, 232-J, 234-J, 235-J, 237-J, 239-J, 241-J, and 242-J)

189. At times, the Hockey Operations Memo reflected rooming charges for a number of player and non-player rooms different than had been stated in the Rooming List. (Stip 2

¶309, Ex. 650-J; 549-J and 604-J; 539-J and 301-J; 543-J and 600-J; 535-J and 594-J)

190. The Rooming Lists and Hockey Operations Memos reflect that 23 players regularly traveled to the away games. (Ex. 487-J to 520-J, 522-J to 570-J; Ex. 591-J to 649-J, 243-J to 324-J)

191. The actual number of meal attendees per the meal invoices (or in the absence of such invoice, the expected number of attendees per BEO, or in the absence of BEO the hotel contract) regularly was less than the number of BPHA travelers per the Rooming Lists. (Stip ¶307, Ex. 590-J GOV00010979, 10980; 201-J BRU0002375, 513-J; 234-J BRU0002514-2515, 568-J)

192. During the 2009 and 2010 tax years, of the players who were provided pre-game meals at the away city hotels, nearly all of the players received compensation from BPHA in excess of \$110,000 per year. (Stip ¶305, Ex. 588-J)

193. Of BPHA's coaches and executives who traveled to the away city hotels during regular season in excess of ten (10) trips during the years at issue, all executives and more than half of all coaches, received compensation from BPHA in excess of \$110,000 per year. (Stip ¶306, Ex. 589-J)

194. Of the staff (not coaches and executives) that traveled to the away city hotels during regular season in excess of ten (10) trips, nearly all received compensation from BPHA

below \$110,000 per year. (Stip ¶306, Ex. 589-J)

ULTIMATE FINDINGS OF FACT

195. The conference rooms and function rooms within which the away-city hotels provided space for BPHA's players to eat their pregame meals lack the permanency of a dining room or cafeteria. (Entire Record)

196. The hotel contracts entered between BPHA and the away-city hotels, in form and substance, constituted sales agreements for a one, or sometimes two, overnight sleeping room agreement of the contracting parties. (Entire Record)

197. The Banquet Event Orders entered between BPHA and the away-city hotels, in form and substance, constituted meal purchase orders. (Entire Record)

198. The business of the BPHA is the ownership and operation of a sports franchise located in Boston, Massachusetts. (Entire Record)

199. The day-to-day business activities of the majority of the employees of BPHA or the Bruins occur in Boston, Massachusetts. (Entire Record)

200. The game day activities of the players and coaches at any single away-city hotel, like film review, medical treatments, and strategy meetings, occur repeatedly at BPHA's home arena, the TD Garden. (Entire Record)

201. The business activities of the players and coaches like conditioning and meetings at any single away-city hotel occur repeatedly either at the TD Garden or BPHA's practice facility at Ristuccia. (Entire Record)

202. The conditioning and training activities which might be undertaken by the players at any single away-city hotel occur repeatedly and throughout the year, including during the off-season, wherever the players are located, most commonly in Massachusetts. (Entire Record)

203. The professionalism of the players in abiding schedules and selection of nutritious pre-game meals relieves the BPHA of the need to furnish such meals. (Entire Record)

204. The pre-game breakfasts, lunches, and brunches at the away-city hotels are provided to the players and coaches with some or all of the remaining support staff excluded. (Entire Record)

205. The costs for the provision of breakfasts, lunches, brunches, and snacks at the away-city hotels during the taxable years were regularly invoiced, reviewed, approved for payment, and accounted. (Entire Record)

206. At the away-city destinations during the regular season, BPHA did not derive ticket sales revenue for tickets sold to customers attending the away-city game. (Entire Record)

POINTS RELIED UPON

Petitioners are not entitled to the meal expense deductions in the amounts of \$127,877 and \$142,223 for their 2009 and 2010 taxable years claimed by Deeridge which owned BPHA which owned and operated the Boston Bruins, an NHL franchise. Contrary to the 50% meals deduction limitation of section 274(n)(1), Deeridge claimed full deduction of the meal expenses it incurred in furnishing pre-game meals (breakfast, lunch, brunch, and snacks) to its players, coaches, executives, and various staff at NHL away games.

Exception to the limitation is unwarranted as BPHA neither owns, leases, nor operates eating facilities at the away city hotels. The conference rooms wherein the meals occurred were not eating facilities under the statute but only temporary locations for buffet service, unlike cafeterias or dining rooms with kitchen and wait staff. BPHA's hotel contracts for rooming do not constitute leases of eating facilities because BPHA does not pay a rental fee for the room; BPHA is subject to cancellation fees for lost food revenues to the hotels in the event of contract breach; and is subject to the hotel's selection of the meeting room and the hotel's reservation of right to change the room. Similarly, BPHA does not contract with the hotels for the operation of eating facilities as the

Banquet Event Orders ("BEO") and eventual invoices for the meals provide a charge for sales taxes upon the food and beverages, showing the BEOs to constitute meal purchase orders.

The hotels are not BPHA's business premises on game days. While meetings between coaches and players to discuss strategy and for film review occur at the hotels, such activities also occur at the away game arenas as well as at home in Boston. Player training, exercise, and conditioning occur both at the hotel and at home, even during the off-season. Qualitatively and quantitatively, the most significant activity is the actual game play which begins with departure from the hotel 2.25 hours before the game which usually takes 150 minutes to play, followed by another hour for changing and media. Activities performed at any one destination city hotel are repeatedly performed at home in Boston or at BPHA's training facility. The majority of BPHA's employees remain in Boston performing their daily business activities including payroll, player and broadcast contract negotiation, and running the sports store.

The meals are not provided for the convenience of BPHA as the away cities are in travel destinations with eating alternatives, and the itineraries show sufficient time to eat at locations other than the hotel. Like the snacks and pre-game meals at home, meal attendance is not mandatory, whereas

attendance at club meetings and events is mandatory. The professionalism of the players in maintaining home game schedules and nutrition demonstrates that control by BPHA on away game days is unnecessary.

The invoices show that meal attendees are regularly less than the full complement of BPHA travelers, reflecting that the staff that was not highly compensated like the players and most coaches was excluded from the meals.

The repeated provision of the meals over the hockey seasons, the value of the meals provided, and the ability of Deeridge to accurately account for those expenses, shows the meals were neither occasional and of small value nor administratively burdensome to account for and hence not de minimis.

Finally, pursuant to the NHL Constitution, BPHA received no ticket sales revenues when playing regular season away games, thus no sales transactions underlay the meal expenses at issue. As a result, the meal expenses do not meet the entertainment sold to customers exception to the 50% meals deduction limitation.

ARGUMENTS

I. Commissioner Properly Disallowed Deeridge's Meal Costs in Excess of 50% Claimed Under I.R.C. §§ 274(a) & (n)

Deductions are a matter of legislative grace, and a taxpayer bears the burden of proving he is entitled to the deductions claimed. See Rule 142(a); INDOPCO, Inc. v. Commissioner, 503 U.S. 79, 112 S.Ct. 1039, 117 L.Ed.2d 226 (1992); New Colonial Ice Co. v. Helvering, 292 U.S. 435, 54 S.Ct. 788, 78 L.Ed. 1348 (1934); Commissioner v. Nat'l Alfalfa Dehydrating & Milling Co., 417 U.S. 134, 149 (1974). For certain expenses like traveling expenses for meals and lodging away from home, Congress imposed stricter substantiation requirements than those required to support ordinary and necessary business expenses under I.R.C. § 162; § 274(d); Jijun Chen v. Commissioner, T.C. Memo. 2015-167. The legislative history to section 274 provides that one of its purposes was to curtail widespread abuses from expensing entertainment and related expenses like meals; which costs, though having a business connection, nevertheless confer substantial tax-free personal benefits. S.Rep. 87-1881 (1962) reprinted at 1962 U.S.C.C.A.N. 3304, 3327-28.

In this case, the Commissioner accepted 50% of the claimed away-game meals deductions as business expenses. I.R.C. § 162.

(Respondent's Request for Finding of Facts 2 and 3, hereafter "RFF") Petitioners seek to establish that they are entitled to one or more of the exceptions to the 50% limitation of I.R.C. § 274(n)(1).

II. Petitioners Failed to Substantiate Exception to 50% Meals Limitation Under I.R.C. §§ 274(n)(2)(B) and 132(e)(2)

Internal Revenue Code § 274(n)(1)(A) provides that the amount allowable as a deduction for any expense for food or beverages shall not exceed 50 percent of the amount of such expense which would otherwise be allowable as a deduction. I.R.C. § 274(n)(2)(B) excepts from the 50% limitation expenses for food or beverages, where such expenses are excludable from the gross income of the recipient by reason of I.R.C. § 132(e), relating to de minimis fringes.

I.R.C. § 132(e)(2) defines as a de minimis fringe the operation by an employer of any eating facility for employees if (A) such facility is located on or near the business premises of the employer and (B) the revenue derived from such facility normally equals or exceeds the direct operating costs of such facility.

The applicable regulations provide:

An employer-operated eating facility for employees is a facility that meets all of the following conditions-

- (i) The facility is owned or leased by the employer,
- (ii) The facility is operated by the employer,
- (iii) The facility is located on or near the business premises of the employer, and
- (iv) The meals furnished at the facility are provided during, or immediately before or after, the employee's workday.

Treas. Reg. § 1.132-7(a)(2). Petitioners' burden, *inter alia*, is to substantiate each of the regulatory requirements, only the last of which has been substantiated. Treas. Reg. § 1.132-7(a)(2)(iv).

BPHA Does Not Own or Lease Eating Facilities

Petitioners make no claim as to ownership of the eating facilities. Treas. Reg. § 1.132-7(a)(2)(i). The hotel agreements do not substantiate compliance for a lease of eating facilities. None are entitled as leases or in the form of lease agreements for eating facilities. (RFF 86) Rather, in form and substance, they are consistently contracts for the reservation of blocks of rooms for overnight stays, often with minimal text regarding meals, sometimes making no mention of meals. (RFF 87, Ex. 21-J, 25-J, 26-J, 33-J, 43-J, 45-J, 52-J, and 57-J)

Under I.R.C. § 7701(e)(1), certain facets of a contract for services may render an agreement a lease. For example, where the owner of ocean-going vessels chartered the vessels along with their crews to customers, factors indicating that the

charter agreements were leases rather than service agreements included whether the customer physically possesses the property, controls the property, or has a significant economic or possessory interest. Other factors indicating a lease include where the owner did not bear risk of substantially diminished receipts from non-performance, the owner does not use the property concurrently for other uses, and whether the total contract price is proportionate to the rental value of the property. See e.g., Tidewater v. U.S., 565 F.3d 299 (5th Cir. 2009). While BPHA occupies the room to the exclusion of other hotel clients, it neither possesses nor controls the hotel kitchen, and the hotels retain both a presence in the room and the right to change the room. (RFF 83, 84, 107, 108, 123, Tr. 159.21-160.2) Most pertinently, the hotels bear risk of significant revenue loss for breach, whereas BPHA regularly pays nothing for the room's usage, factors which indicate no lease. (RFF 83, 89, and 98-101)

Regularly, the hotels agreed to provide a conference room or function space for meals on a complementary basis often contingent upon the number of reserved sleeping rooms or level of expected food and beverage revenue. (RFF 83, 88 and 89) Damage provisions for contract breach often referenced lost food and beverage revenue and lost sleeping room revenue, but never

lost eating facility rental revenue. (RFF 97-100) The hotels expressly reserved the right to change the conference room, usually due to a change in the number of meal attendees from that estimated by BPHA in the contract. (RFF 84, 85, 90, and 123)

Petitioners' expected reliance on Mabley v. Commissioner, T.C. Memo. 1965-323 is misplaced. In that case, a yearly lease existed between the taxpayer's employer and a nearby hotel. The hotel contracts herein are for short term overnight rooming, with meals requested only on game days and regularly listing start and end times for the function space. (RFF 112-116)

No Contract for the Operation of Eating Facility

An employer itself does not need to directly operate the eating facility, but may contract with another to operate the eating facility for its employees. Treas. Reg. § 1.132-7(a)(3). Petitioners have not substantiated that BPHA contracted with the hotels for such operations.

Petitioners pointed to service charges on the BOEs in support of their position. (Tr. 181.21-22) Conveniently, petitioners did not note to the Court the repeated instances that the BEOs, as well as the eventual bills, checks, and invoices show sales taxes were imposed on the food charges. Such assessments demonstrate that the BOEs were not contracts

for services, but instead, in form and substance, meal purchase orders. (RFF 122 and 185)

No case law addresses the question of what constitutes an "eating facility" contemplated under the statute. A survey of the provisions in the Treasury Regulations at § 1.132-7 which describe the requirements of I.R.C. § 132(e)(2), shows that the regulations refer to "dining rooms" and "cafeterias" See e.g., Treas. Reg. § 1.132-7(a)(1)(ii) ("each dining room or cafeteria in which meals are served is treated as a separate eating facility."); Treas. Reg. § 1.132-7(b)(2)(ii) Additionally, the regulations contemplate a location at which individuals are employed to prepare and/or serve food. Direct operating costs include "the cost of labor for personnel whose services relating to the facility are performed primarily on the premises of the eating facility" and "labor costs attributable to cooks, waiters, and waitresses." Treas. Reg. § 1.132-7(b)(1)(ii).

These regulations indicate that an "eating facility" means an identifiable location that is designated for the preparation and/or consumption of meals. BPHA's use of hotel meeting rooms involving buffet style meals and round tables organized for 25 attendees is not what Congress intended to constitute an eating facility under I.R.C. § 132(e)(2). (RFF 148, 176, 187, and 188) The meals do not involve waiters, waitresses, or cooks, other

than the occasional omelet chef. (RFF 176, Tr. 175.7-8, Ex. 115-J BRU0001017, 117-J BRU0001027) The meeting rooms are temporarily organized to accommodate the BPHA's buffet style meal. (RFF 148) Food is prepared by hotel staff in the hotel kitchen. (Tr. 171.13-16) Other than the omelet chefs, no personnel costs are directly charged to BPHA. The food stations and seating are not fixtures permanently constructed next to a kitchen as in the case of a cafeteria or formal dining room. Instead, the room setup exemplifies the transient nature of activity. This setup is consistent with the actual documentation which reflects not the operation of an established and fixed food preparation and/or eating facility, like a cafeteria or dining room, but only the purchase of a few meals on an individual day to be held in a private room.

Away City Hotels Were Not BPHA's Business Premise

Petitioners' bear the burden to show that each eating facility is located on or near the business premises of BPHA. I.R.C. § 132(e)(2)(A); Treas. Reg. § 1.132-7(a)(2)(iii). Whether or not a location is on the business premises of an employer is a factual test to be determined on a case by case basis, requiring a common sense approach. Adams v. United States, 585 F.2d 1060 (Ct. Cl. 1978). The phrase has been construed to include premises on which the employer carries on

some substantial segment of its business activities and a place where the employee performs some significant portion of his duties. McDonald v. Commissioner, 66 T.C. 223, 230 (1976). In McDonald, the Tax Court expressed its analysis as a test of "quantum and quality" of the business activities performed in the relevant company housing. McDonald at 231.

Respondent submits that the activities occurring at the hotels when viewed in comparison with BPHA's entire business operations, as well as in comparison with the actual performance of the professional hockey game, demonstrate that such activities, though arguably business related, fall short of the quantum and quality test. See also, Benninghoff v. Commissioner, 71 T.C. 216, 222 (1978) (per curiam)

Unquestionably, the Bruins traveled to the destination cities to play professional hockey games. (RFF 29) Playing the game is qualitatively the most significant activity performed by the employees at the destination cities, an activity conducted at the host team's arena, not at the hotel. During regular season play, visits to the individual destination cities usually involved only a single overnight. (RFF 112-114) Repeat visits to the same cities for regular season play over the years at issue meant that time at some cities aggregated up to six nonconsecutive nights, most usually 1 or 2 in 2009, and 4 in

2010. (RFF 138 and 139) Some destination cities were only visited once over the regular season play in the two years at issue (Glendale, AZ Ex. 36-J; St. Paul, MN 55-J; Dallas, TX 33-J; Los Angeles, CA 37-J). Some travels to the same city involved different hotels. (RFF 140) Balanced against those away days with little temporal connection to each individual destination city hotel, BPHA nearly always played its regular season home games in Boston (RFF 7, 24, and 25) and conducted daily practice skates on non-game days at the Ristuccia practice rink. (RFF 55-58) The quantum of time spent at any one destination city hotel compared to time spent at Ristuccia or Boston shows that the away city hotels were not BPHA's business premises.

While certain hockey activities occurred at the hotels on a travel day from Massachusetts, the air flights were usually preceded by practice at Ristuccia. (RFF 135, 133, and 132) Most flights arriving before 7:00 p.m., players were able to use free time before curfew to leave the hotel. (RFF 127, 128, and 132) Practices were so significant that unlike meetings they were regularly scheduled on the various itineraries and conducted immediately after breakfast and even on layover days. (RFF 137, 149-157) And while players may exercise at the individual hotels, they are continually conditioning and

training at home, even during the off-season (RFF 135, 136, and 55-57)

On game day, time constraints limited the activities occurring at the hotels since bus departure was 10:15 for practices usually scheduled for 11:30-12:30, before returning for lunch. (RFF 152-157) At the practice, coaches met with players to give strategic direction regarding skating and game-play. (RFF 64, 158, and 159)

Among the activities which are performed home and away coaches strategize (RFF 74), coaches meet one-on-one or in small groups with players (RFF 69), coaches show video to players (RFF 69), players train and exercise (RFF 57), players receive medical treatments (RFF 66), and players can get a massage (RFF 66). The fact that these ancillary activities to game play occur both while at home and away reflects their business nature, but their parallelism between home and away games demonstrates that they are not materially significant on a quantitative basis at any one away hotel when compared to at home.

BPFA is engaged in the ownership and operation of an NHL sports franchise located in Boston generating revenue primarily from home-game ticket sales, television and radio broadcasting, and retail sales from its sports shop located in Boston. (RFF

7, 37-39, and 31) The travelling unit of BPHA encompasses only a fraction of the Bruins employees, the majority whom continued to work, year round, at the Boston offices. (RFF 40-45) Those activities included making travel arrangements; equipment purchases; negotiating player contracts, broadcast contracts, and insurance contracts; registering trademarks; media relations; payroll, accounting and finance. (RFF 46-54) The qualitative significance of most of these business activities outweighs those at the away-city hotels.

When juxtaposed against the actual game play at the arenas, and more particularly against the repeated activities occurring at either TD Garden on game day or at Ristuccia, the significance of the activities at any one hotel is overshadowed.

B. Revenue from Eating Facility Does Not Equal Direct Operating Costs

Section 132(e)(2)(B) further requires that petitioners substantiate that the revenue generated by the operation of the eating facility equals or exceeds the direct operating costs of the facility. Petitioners have made no showing as to revenue generated from away city meals or the direct operating costs of any such away city facility.

The flush language of the statute provides a safe harbor for this determination. For purposes of this section, an

employee entitled under section 119 to exclude the value of a meal provided at such eating facility shall be treated as having paid an amount for such meal equal to the direct operating costs of the facility attributable to such meal. The two requirements of § 119 relevant to this case are that the meals be furnished for the convenience of the employer and that the meals be furnished on the business premises of the employer.

Meals Furnished to Players Were Not Done for BPHA's Convenience

Meals furnished without charge to the employee will be considered for the convenience of the employer if such meals were furnished for a substantial non-compensatory business reason of the employer. Treas. Reg. § 1.119-1(a)(2).

Regulatory examples include where the employee needed to be restricted to a short meal period and the employee could not be expected to eat elsewhere in such a short time, if the employee needed to be on-call for emergencies during meal periods, and if there were an absence of sufficient eating facilities in the vicinity of the employer's premises. Treas. Reg. § 1.119-1(a)(2)(ii).

The allocable time for the pre-game meals ran from 2 to 4.5 hours, reflecting no need to restrict the meals to short periods and undercutting petitioners' claim that time management underlay the need to provide the meals. (RFF 141, 162, and 169;

Tr. 75.23-76.4, Tr. 79.7) Nearly all the hotels are in regularly travelled destination city locations like Tampa, Pittsburgh, Philadelphia, Montreal, and Atlanta at which there exists no lack of alternative eating facilities.

Petitioners claim the meals provide nutritious quantities of protein to the athletes. (Tr. 119.3-8) Yet on the days of arrival at the away cities, layover days, and the breakfasts and lunches before home games, players are able to eat responsibly on their own. (RFF 132, 133, 137, 65; Tr. 64.16-19, Tr. 101.9-16, Tr. 102.18-20).

The courts have generally applied the business necessity theory while examining whether meals are furnished for the convenience of the employer. Commissioner v. Kowalski, 434 U.S. 77, 93 (1977). Under the business necessity theory, the exclusion from gross income for meals applies only when the employee must accept the meals in order to properly perform his duties. Id. Courts applying this standard have not, of course, required taxpayers literally to demonstrate a link between the meals and employees' specific duties. The Ninth Circuit observed in Boyd Gaming v. Commissioner, 177 F.3d 1096, 1101 (9th Cir. 1999), that such a threshold "would render the test virtually impossible to satisfy; only restaurant critics and dieticians could meet such a test." Id. An employer's policy

requiring employees to eat certain meals in certain locations may indeed satisfy this test. Boyd Gaming specifies, however, that it is not enough for the employer "simply to wave a 'magic wand' and say it had a policy in order to be entitled to a deduction." Id. The employer must instead support its policy "with adequate evidence of legitimate business reasons" which the employer in Boyd Gaming provided by supplying the court with "credible and uncontradicted evidence regarding the reasons underlying the 'stay-on-premises' policy." Id.

Petitioners have failed to set forth any such "credible and uncontradicted evidence" that BPHA had a policy requiring players to attend pre-game meals, or that such a policy was supported by legitimate business reasons. The parties agree that under the CBA it is mandatory for players to be present for meetings; however, the evidence and testimony as to the mandatory nature of attendance at pre-game meals is conflicting. (RFF 32-34; Tr. 101.9-16) Attendance is not regularly taken for away-game lunches. (Tr. 84.2-4) Afternoon snacks are not mandatory. (RFF 166) At home, breakfasts, lunches, and brunches were not mandatory. (RFF 65; Tr. 101.9-16). Respondent submits that petitioners conflate the post-breakfast meetings with the meal to allege breakfast attendance is

mandatory. (RFF 143-148, 35). As corroboration, the players do not arrive en mass for breakfast, but individually during the ascribed time period. (RFF 142)

Testimony further reflects that post-breakfast meetings of BPHA can occur at their competitor's arena during morning practice. (RFF 158, 159, 76, and 160; Tr. 25.18-19) Sufficient time is available as bus departure from the hotel is usually at 10:15 a.m. and practice time is scheduled for 11:30-12:30, with only minimal time on the ice. (RFF 149-158, 62)

Petitioners' provision of meals to the players is similar to the law firm's provision of meals to the lawyers in Moss v. Commissioner, 80 T.C. 1073 (1983), admittedly a case under I.R.C. § 262, where luncheon business discussions were shown yet insufficient to change personal expenses into business deductions. While film review and strategy discussion may transpire after eating in the conference room, such activities do not substantiate the meals to be provided for BPHA's convenience.

Meals Not Provided on BPHA's Business Premises

The relevant matters underlying this issue of business premises have already been articulated at Section II.A.

Insufficient Number of Employees Precludes Full Application
of Section 119 Exclusion

When meals are furnished on the business premises of an employer and it is determined that more than half of those employees were furnished the meals for the employer's convenience, all meals furnished on such business premises will be treated as for the convenience of the employer. I.R.C § 119(b)(4)

The most frequent number of travelling players during the years at issue was 23. (RFF 79 and 190) The most frequent number of travelers consisting of players, coaches, staff, including executives was 36. (RFF 186) Petitioners having failed to substantiate that the meals were provided to the players on BPHA's business premises for BPHA's convenience pursuant to I.R.C. 119(b)(4), the remaining pre-game meals provided to the other BPHA employees would not be considered provided for the convenience of BPHA.

C. Provision of Meals Discriminates in Favor of Highly-Compensated Employees

A further requirement of the statute, as stated in its flush language, is that the provision of the meals must not be done in a manner that discriminates in favor of highly compensated employees. Access to the eating facility must be

available on substantially the same terms to each member of a group of employees which is defined under a reasonable classification set up by the employer which does not discriminate in favor of highly compensated employees. I.R.C. §132(e)(2)

A highly compensated employee is one who during the years at issue, received compensation from the employer in excess of \$110,000. I.R.C. §§132(j)(6) and 414(q)(1) (specifying that the Department of Treasury will regularly adjust the highly compensated employee compensation threshold); Treas. Reg. § 1.132-8(f)(1)(ii) and (iv); I.R.S. Notice 2008-102, 2008-2 C.B. 1106 (announcing 2009 threshold); I.R.S. Notice 2009-94, 2009-2 C.B. 848 (announcing 2010 threshold). The players, executives and most coaches that traveled were highly compensated. (RFF 192 and 193) The other BPHA staff that most frequently traveled with the team was not highly compensated. (RFF 194)

The determination of whether a benefit is available on substantially the same terms shall be made upon the basis of the facts and circumstances of each situation. In general, however, if any one of the terms or conditions governing the availability of a particular benefit to one or more employees varies from any one of the terms or conditions governing the availability of a benefit made available to one or more other employees, such benefit shall not be considered to be available on substantially

the same terms except to the extent otherwise provided in the regulation regarding necessary discrimination due to insufficient availability of the fringe benefit where discrimination is allowed on a priority basis (first come, first served) or seniority. Treas. Reg. § 1.132-8(c)(1), (2)(i) and (2)(ii).

Petitioners have been inconsistent on the question of to whom the pre-game meals were made available. At times the direct testimony was that no members of the travelling complement were excluded from the meal rooms or from eating. (Tr. 66.11-15, Tr. 83.10-12) At other times during direct testimony, petitioners' witness stated that staff was excluded, leaving the players and coaches alone. For instance, Mr. Julien stated, "The PR people and all the rest of the Bruins staff will come in after those players have left so that they [the players] can have their own space." (Tr. 48.22-25) This was no error as Mr. Julien reiterated the statement later in his testimony regarding lunch. (Tr. 82.21-83.1)

Although meal invoices for all away game meals have not been provided, those that have been provided regularly reflect the number of meal attendees. (RFF 185) Mr. Nadeau reviewed these invoices prior to payment for accuracy. (RFF 183) His corrections to the hotel contracts and BOE show his attention to

exactitude. (RFF 92-96, 119, and 120) As a beneficiary of some hotel loyalty rewards programs, he bears a self-interest in their correctness. (RFF 103) Finally, since sales taxes and service charges were regularly imposed on the food and beverage amounts, the accuracy of the number of meal attendees on the invoices can be assured. (RFF 117, 122, and 185)

Petitioners bear the burden that the BPHA did not discriminate. Mr. Bucyk was BPHA's on site agent who allegedly monitored who ate breakfast, and potentially lunch. (RFF 104-106; Tr. 84.2-4) No listings of meal attendees were furnished by petitioners. Pursuant to some of the hotel contracts, Mr. Bucyk was charged with verifying the accuracy of the bills or checks. (RFF 107 and 108) Finally, the hotel contracts and BEOs regularly emphasized the importance to the hotels of the food and beverage revenues, with provisions regarding damages for contract breach, meal charges based upon minimum number of guaranteed attendees, and surcharges for attendees beyond the number expected, with billing based on the higher number. (RFF 90, 98-101, 110, and 111)

Over the two year period, the number of meal attendees for breakfasts/brunches and lunches was most frequently 25. (RFF 187 and 188) The number of travelling players was usually 23. (RFF 190) The number of total travelers, (players, coaches,

executives, and staff) was usually 36 based on the Rooming Lists. (RFF 186) Exhibit 590-J summarizes the comparisons, meal by meal. Where invoices were absent, BEO were used, and where such BEO were absent, the hotel contracts were used. (RFF 187 and 188)

Since Mr. Nadeau's Hockey Operations Memos indicated some rooming changes at variance from the Rooming Lists, Exhibit 650-J summarizes those changes with the result that the total number of usual travelers was 35. (RFF 186 and 189)

A classification that, on its face, makes fringe benefits available principally to highly compensated employees is per se discriminatory. Treas. Reg. § 1.132-8(d)(2). Lacking petitioners' substantiation otherwise, Respondent submits players, coaches, and executives ate in preference to support staff, resulting in staff wholly or proportionally excluded. This is per se discriminatory.

The regulations go on to state, "A classification that is based on factors such as seniority, full-time vs. part-time employment, or job description is not per se discriminatory but may be discriminatory as applied to the workforce of a particular employer." Treas. Reg. § 1.132-8(d)(2).

Petitioners, however, have not argued that BPHA provided the meals based on such factors. Moreover, Mr. Julien's testimony

is contradictory. By impermissibly precluding those staff present at the meals from eating, BPHA changes one of the terms or conditions governing the availability of a particular benefit in a discriminatory manner to the benefit of highly compensated employees. Treas. Reg. § 1.132-8(c)(1).

III. Petitioners Failed to Substantiate Exception to 50% Meals Limitation Under I.R.C. §§ 274(n)(2)(B) and 132(e)(1)

Section 274(n)(2)(B) excepts from the 50% limitation, expenses qualifying under I.R.C. § 132(e). In the alternative to I.R.C. § 132(e)(2), the Code at § 132(e)(1) defines a de minimis fringe to be any property or service the value of which is (after taking into account the frequency with which similar fringes are provided by the employer to the employer's employees) so small as to make accounting for it unreasonable or administratively impracticable. Treasury Regulation § 1.132-6(e)(1) provides examples of de minimis fringe benefits to include the occasional typing of personal letters by a company secretary; occasional cocktail parties, group meals, or picnics; coffee, doughnuts, and soft drinks; local telephone calls; and flowers, fruit, books, or similar property provided to employees under special circumstances (e.g., on account of illness, outstanding performance, or family crisis).

Based on the nature of the pre-game meals in terms of frequency, cost, and record keeping, the cost for away-game meals is not so small as to make accounting for it unreasonable or administratively impracticable.

During 2009 and 2010, BPHA played 37 and 41 away games, respectively. (RFF 24 and 25) In those years, most away games were performed in the evenings at 7:00 p.m. or later, 28 regular season away games in 2009 and 33 in 2010. (RFF 152-156) When such evening games were performed, three pre-game meals were provided, a breakfast, lunch, and snack. (RFF 141, 162, and 166) In the alternative to the evening games, at times an afternoon game was scheduled. Brunches were served when afternoon games were scheduled, replacing the breakfasts and lunches. (RFF 169) Approximately 93 meals were served in 2009 [e.g., $28 \times 3 + (37 - 28)$] and 107 in 2010, not including the meals provided during the post-season playoff games. Merely on the frequency and regularity with which the meals were provided, petitioners fail to meet the "occasional" basis required by the regulation. Treas. Reg. § 1.132-6(d)(2)(A).

Similarly, the value of the meals, aggregating to approximately \$255,754 for tax year 2009 and \$284,446 for tax year 2010, amounts included in other expenses on Deeridge's tax returns, (Exhibits 1-J BRU0002883; Ex. 5-J GOV 00010594 and 6-J)

shows that the expenses under examination are of a magnitude exceeding what the statute contemplated.

Finally, Mr. Nadeau regularly reviewed the meal costs from the hotel invoices and copied those costs onto his expense memoranda, and Deeridge recorded the costs onto its financial account # 534278. (RFF 180-184) The ability of Deeridge to credit the away-game meals to its financial account demonstrates its ability to appropriately track the pre-game meal costs.

IV. Petitioners Failed to Substantiate Exception to 50% Meals Limitation Under I.R.C. §§ 274(n)(2)(A) and 274(e)(8)

Section 274(n)(2)(A) provides exceptions to the 50% limitation under I.R.C. § 274(n)(1)(A), including an exception under I.R.C. § 274(e)(8) for "Entertainment Sold to Customers - expenses for goods or services (including the use of facilities) which are sold by the taxpayer in a bona fide transaction for an adequate and full consideration in money or money's worth." Treasury Regulation § 1.274-2(f)(2)(ix) provides examples of such expenses as "the cost of producing night club entertainment (such as salaries paid to employees of night clubs and amounts paid to performers) for sale to customers or the cost of operating a pleasure cruise ship as a business will come within [the section 274(e)(8)] exception."

Petitioners' case is markedly different from the examples in the regulations. The salaries paid to the players, coaches, and staff are not in dispute in this proceeding. Instead, the cost of pre-game meals provided to employees at away city destinations are at issue. The meal costs incurred by BPHA are not costs of entertainment provided by BPHA in the same venue where BPHA's customers are co-located as on a pleasure cruise or night club. Petitioners have failed to demonstrate that the meal costs were incurred "for goods or services ... which are *sold* by the taxpayer in a bona fide transaction" (emphasis added) which removes petitioners from the ambit of I.R.C. § 274(e)(8). BPHA provides entertainment. (Stip ¶68) However, in order for § 274(e)(8) to apply, the meal costs related to that entertainment must be incurred as part of a bona fide sales transaction.

No bona fide sales transactions were undertaken by BPHA related to the meals provided at the away city hotels. While performing regular season away games, BPHA, pursuant to the NHL Constitution, receives no share of the ticket receipts. (RFF 29-31) According to BPHA's certified financial statements, the only revenues from sales transactions are listed as merchandise sales, presumably arising from BPHA's ownership and operation of the store in Boston. (RFF 37-39)

While significant broadcast revenues were received, those revenues derive from licensing fees from broadcasters like NESN and CBS Radio East Inc. (RFF 39, Stip ¶237 and ¶238) The viewing hockey fans are the customers of those applicable broadcasters, not sales customers of BPHA.

In a prior tax abatement matter before the Commonwealth of Massachusetts, the petitioners and BPHA argued that the Commonwealth erroneously taxed 100% of BPHA's 1991-1994 ticket revenues since the team played games in other states and Canada, foreign jurisdictions to Massachusetts. The petitioners asserted that while not sharing in the gate receipts when away games were played, consideration was received in the form of a consequent obligation of the opposing team to play a game in Massachusetts. (Ex. 582-J BRU0002833)

Petitioners' assertion on this matter was rejected by the Appellate Tax Board ("ATB"), whose decision was affirmed by the Supreme Judicial Court of Massachusetts, which determined that the obligation of an opposing team to play in Massachusetts arose as a result of the NHL Constitution, not from the play by the Bruins of an away game. Boston Professional Hockey Association, Inc., vs. Commissioner of Revenue, 820 N.E.2d 792, (Mass. 2005), 443 Mass. 276, 287 (Oct. '04-Jan. '05) affirming in part and vacating & remanding in part a determination by the

ATB. (Ex. 583-J BRU0002812-2813) Therefore, BPHA did not receive any consideration from any bona fide sales transactions from the away city games.

The Sixth Circuit and Tax Court have held that § 274(e)(8) does not apply if bona fide sales transactions did not occur. In Churchill Downs, the petitioner hosted dinners, receptions, and parties to generate publicity for its race track. Churchill Downs, Inc. v. Commissioner, 115 T.C. 279, 280 (2000) aff'd, 307 F.3d 423, 429 (6th Cir. 2002). The Sixth Circuit held that these events did not qualify as entertainment sold to customers under § 274(e)(8) because those invited did not pay for the privilege of attending.

Similarly in Boyd Gaming, the petitioners therein provided free meals to their casino employees at an employee cafeteria on the business premises. Boyd Gaming Corp. v. Commissioner, 106 T.C. 343, 344 (1996), rev'd on other grounds, 177 F.3d 1096 (9th Cir. 1999). Reasoning that the meals were not sold to the employees in a bona fide transaction, the Tax Court held that § 274(e)(8) did not apply.

As no bona fide sales transactions are undertaken by BPHA associated with the meals provided at the away city hotels, I.R.C. § 274(e)(8) does not apply.

CONCLUSION

It follows that the determination of the Commissioner of Internal Revenue should be sustained.

WILLIAM J. WILKINS
Chief Counsel
Internal Revenue Service

Date: 9/30/16

By: Leon St. Laurent

LEON ST. LAURENT
Senior Attorney (LB&I)
Tax Court Bar No. SL0695
One Newark Center
Ste. 1500
Newark, NJ 07102
Telephone: (973) 681-6639

Randall S. Trebat Jr.
Attorney (LB&I)
Tax Court Bar No. TR0465
455 Massachusetts Ave. NW
Washington, DC 20001
Telephone: (202) 572-4710

OF COUNSEL:

THOMAS J. KANE

Division Counsel LB&I

MICHAEL P. CORRADO

Area Counsel (Heavy Manufacturing &
Pharmaceuticals) LB&I

PATRICIA Y. TAYLOR

Asso. Area Counsel LB&I